

§ 1210.11

(3) A copy of MSPB Form 185, the MSPB Appeal Form. MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>);

(4) Notice of any right the employee has to file a grievance, including notice that the election of any applicable grievance procedure may result in a waiver of the employee's right to file an appeal with the Board and as to whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d); and

(5) Notice that a copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

(b) The notice must also include a specific statement that the matter was taken under 5 CFR part 9701.

[72 FR 56885, Oct. 5, 2007, as amended at 73 FR 21023, Apr. 18, 2008]

§ 1210.11 Filing an appeal.

(a) *Time of filing.* An appeal must be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later. A response to an appeal must be filed within 15 days of the date of service of the acknowledgment order. All other submissions to the adjudicating official must be filed in accordance with the time limits set in the Board's acknowledgment order or in any other order issued by the adjudicating official.

(b) *Computation of time.* The time for filing a submission under this subpart is computed in accordance with 5 CFR 1201.23.

(c) *Place for filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See 5 CFR 1201.4(d), 1201.22(a), and Appendix II to part 1201.

(d) *Decision notice.* A copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

§ 1210.12 Representatives.

Each party has the right to be represented by an attorney or other representative. Either party may file a

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motion to disqualify a representative at any time during the proceedings.

§ 1210.13 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof*—(1) *Agency.* Subject to paragraph (b) of this section, the decision of the Department must be sustained if it is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

(b) *Affirmative defenses of the appellant.* The decision of the Department must be sustained where it has met the evidentiary standard stated in paragraph (a) of this section, unless the appellant shows that:

(1) There was harmful error in the application of the Department's procedures in arriving at its decision;

(2) The decision was based on a prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(2) *Harmful error.* Error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

(d) *Efficiency of the service.* Pursuant to 5 CFR 9701.606, the Department may take an adverse action under subpart F of 5 CFR part 9701 only for such cause as will promote the efficiency of the service.

§ 1210.14 Initial disclosures; scope of discovery.

(a) *Initial disclosures.* Except to the extent otherwise directed by order,